on his part to the United States their liberty, sovereignty and independence, absolute and unlimited, as well in matters of government as commerce.

When the wars of the French Revolution broke out, to which Great Britain became a party, but in which the United States was able to preserve its neutrality, John Jay, then Chief Justice of the Supreme Court of the United States, was sent to England on special mission, in order to prevent a rupture with Great Britain, which then seemed imminent. He was able to conclude and sign, on November 19, 1794, the treaty which bears his name, according to Great Britain some of the rights which had been exclusively granted to France in the Treaty of Amity and Commerce.

It is as idle to contend that the Jay treaty was consistent with the Treaty of Amity and Commerce with France as it is futile to maintain that we complied with the guarantee solemnly made to our first and our only ally of the then "possessions of the Crown of France in America." It was apparently in the interest of the United States to violate the treaty. It did so, and by a subsequent agreement of the parties, the treaty was abrogated, which neither had observed under the pressure of an impelling necessity.

We are, therefore, justified in saying, with our own example before our eyes, that nations will not agree to an obligation which at the time of its conclusion does not seem to them to be in their present interest, or which they do not at the time of signing conceive to be in their future interest; and that, when the contingency arises for the application of the treaty, if it be not then in their interest, they themselves being the judges, they will find some method of defeating the obligation which they had solemnly contracted.

Therefore, it seems to many the part of wisdom to agree only upon an advance at any particular time that can willingly and without compulsion be made, leaving it to the future and in the light of experience to take the next step, and later a farther step and indeed an infinite series of steps, which point to, if they do not actually reach, the ultimate goal.

The project of the Advisory Committee of Jurists for the creation of a permanent court of international justice, elaborated with such skilful and generous hands, was questioned by the Council, and it left the Assembly mutilated and disfigured. It can, however, be amended, if the nations care to restore its original features, or, indeed, to improve upon them, for human endeavor is faulty at best, and is a compromise between the desirable and the attainable.

We may draw comfort from the experience of one Solon, who said, in reply to a criticism of the laws which he devised for the Athenians, that he did not submit to them the best which he could draft, but the best which they would accept.

The Jurisdiction and Powers of an International Court

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WE are to consider how far the jurisdiction of an international tribunal can be made obligatory upon the parties, and by what means, if any, its decisions can be enforced. Upon the tremendous importance of these problems it is needless for me to dwell. The right solution of them is obviously

essential to any organization of international society, if that organization is to endure.

I believe that the jurisdiction of an international court can ultimately be made obligatory upon the parties when certain preliminary conditions have been fulfilled. At the same time, I wish to make it clear that these preliminary conditions are not yet fulfilled, nor have we any reason to expect their attainment in the immediate future. When the principle of obligatory jurisdiction is generally accepted, the question of the proper means of enforcing judgments will then arise. To my mind this is essentially a subordinate problem, and will not prove an insuperable difficulty, provided that the question of jurisdiction has received a definite and final settlement.

Until these preliminary conditions to which I have referred are fulfilled, the jurisdiction of the court must rest wholly upon the agreement of the parties to each dispute and must therefore be limited in its extent by the terms of that agreement.

FUNDAMENTAL CONDITIONS

What then are these conditions? To my mind, the first and most fundamental of these conditions is that the court should have a definite, written, and accepted law which it can apply to all controversies that may come before it. This principle is one which may not find ready acceptance among those who have been brought up in the atmosphere of the Anglo-American common law. For about seven centuries we have grown accustomed to a legal system under which the courts have manufactured their law as they went along, continually inventing, refining, and modifying rules to suit the circumstances of the particular cases that came before them. To us it seems the most natural thing in the world to accept a rule as positive law merely because two or three lawyers have promulgated it from their seat on the bench. But let us remember that we are not the whole of the world. This theory of judge-made law has never been accepted as part of the legal tradition of Continental Europe or of those countries which have inherited the general structure of the civil law of Rome. The people of these countries expect to have the main principles of their law clearly laid down for them in an authoritative code. Of course, the interpretation and application of the code in particular controversies must always be a matter for the courts, and a steady stream of concurrent decisions—what the French call the "jurisprudence" of the tribunals—may result in a particular interpretation of an ambiguous article being generally accepted as authoritative. But no Continental lawyer will ever admit that a disputed question is of necessity finally closed by an isolated decision even of a court of final appeal.

Furthermore, even apart from this difference of legal tradition, there are very strong reasons which render it impossible for us to expect that the nations will ever consent to accept a body of international law that is manufactured by the court to meet the exigencies of particular cases. We must remember that, when we invite nations to submit their differences to a court, we are asking them in effect to surrender—so far as the matter at issue is concerned—that prerogative of deciding their own policy according to their own judgment, which is the one essential mark of national independence. The concession thus demanded is tremendous, and we have no right whatever to ask for it unless we are in a position to promise that the vital interests of each nation will be in no way endangered thereby.

SAFEGUARDS

What then are the safeguards which we can promise? The first and most elementary precaution is to lay down precisely in black and white a clear statement of the obligations which a nation undertakes by agreeing to accept the jurisdiction of the court. This necessarily includes a complete statement of the law which the court is going to administer. No self-respecting nation is going to pledge itself in advance to accept any and every decision that may commend itself to a small handful of lawyers of diverse nationalities, guided by nothing more definite than their individual ideas of right and wrong. Any rulers who attempted to commit their people to such a course would, in my opinion, be guilty of nothing less than a grave breach of trust. They are absolutely bound to demand that the court, which is to pronounce upon the destinies of their nation, shall be guided by a definite code of rules which have previously been examined and approved by the law-making body of the nation itself. In other words the nation can be bound by laws to which it has given its own deliberate consent. It can not give a blank order to a group of nine foreign lawyers to make laws for the whole world.

The American Constitution gave to the Supreme Court jurisdiction in controversies between states. Of such controversies there was no lack. Eleven were pending when the Constitution first came into force. Nevertheless, be it well remembered that more than half a century elapsed before the Supreme Court was placed in a position to render a final decree in a suit between two states. For many years every attempt to invoke the jurisdiction of the Court against a state was met with the most jealous hostility. Only by slow stages was the public mind induced to accept the idea that one state could be sued by another state against its own will in the Supreme Court. In more than one instance the decrees of the Court were deliberately defied, and this defiance met with a very large measure of support from the public opinion of the nation.

Nevertheless, the Court won through and established upon a firm basis the jurisdiction which it has since exercised with such beneficent results. Imagine what the result would have been had the Court been left to find its own way in the dark without any definite law to guide it. The Supreme Court was armed from the outset with two accepted bodies of law. One of these was the written Constitution of the United States, to which every state had pledged its allegiance upon entering the Union. The other was the general body of English common law and equity, which had been inherited by the whole nation as an integral part of the national life. Let us suppose that the questions arising between the states had been left to be decided by a tribunal consisting of an American, an Englishman, a Spaniard, a Frenchman, and a Dutchman, who were to decide entirely according to their own ideas of what was right and just, untrammeled by any code or by any body of generally accepted law. I need hardly say that the decision of such a tribunal, however eminent might be the individual judges, would have carried no moral weight and would never have been obeyed. The task of the American Supreme Court was difficult enough in any case, and its successful completion is one of the noblest achievements of the United States. Without the Constitution and the common law the task would have been hopeless.

JURISDICTION OF THE COURT

Let us now turn to the statute establishing the International Court of Justice under the authority of the League of Nations. Article 59 of that document runs as follows:

> The decision of the Court has no binding force except between the parties and in respect of that particular case.

This clause, I may point out, did not appear in the original draft scheme drawn up by the Advisory Committee of Jurists, but it was inserted at a very early stage of the discussions. From this it is clear that it was the deliberate intention of the League to exclude by the most explicit words any idea that the Court was to be permitted to manufacture a body of international law by its decisions in individual cases. I venture to think that the insertion of these words was entirely right and was necessary in order to safeguard the dignity of the states which submit themselves to the jurisdiction of the Court.

From this two results follow. In the first place it is necessary for the nations of the world to arrive at some agreement as to what are the rules of international law which they will accept as binding upon them. A formal invitation to undertake this great work has been issued by the Council of the League. Upon the magnitude and difficulty of the task there is no need for me to dwell. Upon some of the most important questions of international law there is as yet nothing like general agreement, and the reasons for the disagreement lie, not in mere technical differences of expert opinion, but in the profound divergences of policy which unfortunately still threaten the peace of the world. Any conference that can suceed in really reconciling these differences will have made the most important contribution to the cause of international peace that history has yet witnessed.

Secondly, it follows that, for the present, in default of any general agreement as to the rules of international law, the jurisdiction of the Court must necessarily rest upon the consent of the parties. This consent may either be limited to the particular question in dispute, or may be general and so expressed as to cover all causes of controversy between the contracting parties. Article 36 of the statute provides for both cases, and the protocol of signature contains an optional clause which may be signed by those states which are willing to make a general submission to the jurisdiction of the Court.

Submission to the Court being thus optional, it necessarily results that the law to be applied to the controversy must also depend upon the will of the litigants. Usually it will be found in treaties or other conventions signed by the parties, with regard to which a difference of interpretation has now arisen. Under Article 36, states which sign a general submission to the jurisdiction of the Court are at liberty to empower it to decide "any question of international law." I would repeat that any such submission is entirely voluntary, and that any state which makes it does so of its own deliberate choice and with a full understanding of the risks involved. The principle of voluntary submission to the jurisdiction is maintained throughout, and I believe myself that this principle can not be changed until we have a generally accepted and clearly expressed code of international law.

UNSETTLED PROBLEMS

I come now to the second of what I have described as the preliminary conditions. I may state it in a few words by saying that the draftsmen of our

code must not attempt to obtain an early agreement by the simple expedient of evading difficulties. The temptation to do this is almost irresistible. We can easily imagine what is likely to happen. Some great problem presents itself, and the conference despairs of arriving at an agreement. At last some member gets up and says: "Let us leave this question to be settled when it arises, if it ever does arise, and let us get on to the next item on the agenda." Do not let us deceive ourselves by hoping that the question will never arise. If it is so important as to lead to an irreconcilable difference of opinion in a body of able and responsible men we may be sure that it is going to cause trouble some day. By shelving the awkward problem we may succeed in arriving at an immediate agreement, but we are not discharging our real duty, which is to find means for ensuring the peace of the world. On the contrary we are really ensuring that, when war does come, it shall be a war in which each party shall have equally good arguments on its side.

There are at the present day a number of very difficult and important questions of international law upon which the nations have not as yet succeeded in reaching an agreement. For example, there are a number of problems connected with the use of the seas in peace and war. Then there are the very complicated questions arising out of competing interests in international rivers, lakes, and other waterways. Again, the increasing complexities of modern commercial relations also raise very important problems as to how far nations may legitimately regulate their own trade with the object of inflicting injury upon their rivals. And then, overshadowing all other questions in difficulty and danger, is the tremendous issue presented by the conflicting aims and ideals of European and Asiatic peoples on the shores of the Pacific.

I need hardly say that I have not exhausted the list of unsettled problems. I have mentioned only some of the more important in order to make clear the immensity of the task which lies before those who are entrusted with the duty of codifying the law of the world. It would be folly to look for any quick and easy solution of these enormous difficulties. Many years of patient and laborious work, many sharp conflicts of opinion, perhaps even some more wars, must come before civilized men succeed in reaching that measure of agreement upon essential things, which is the only true foundation of a lasting peace.

To sum up what I have said, it seems to me that there are two preliminary conditions to be fulfilled before we can begin to talk of making the jurisdiction of any international court obligatory upon the nations of the world. In the first place we must provide the court with a full, definite, and universally accepted code of international law which it can apply to all the controversies that come before it. Secondly, we must prepare ourselves to undertake the task of solving in advance, by universal and unambiguous agreement, all those unsettled questions of international law which experience teaches us to be the breeding ground of war. Until these two conditions are fulfilled the jurisdiction of the court can rest only upon the explicit consent of the parties to each particular dispute and must be limited in each case by the terms in which that consent is expressed.

ENFORCING THE COURT'S DECREES

Upon the question of the right method of enforcing the decrees of the Court I do not propose to dwell at any length. So long as the jurisdiction

rests upon the consent of the parties in each case, disobedience to the decree is really the breach of a treaty obligation on the part of the state concerned. Whether the consequences of such a breach of faith are sufficiently serious to justify a resort to war must be a question of policy for the other state to determine according to its own judgment in the particular circumstances of the case. Unless the consequences are such as to react injuriously upon the world at large, I do not think that the injured state can properly call upon other nations to spend their blood and treasure in assisting it to assert its contractual rights. As for what is called "economic blockade," I think that we should be very reluctant to prescribe that as the general penalty for breaches of international good faith. The effectiveness of such a penalty varies immensely according to the circumstance of each case. Some nations would hardly feel it. To others it would mean absolute and immediate ruin. I do not think we should commit ourselves too hastily to the general adoption of a punishment which operates so unequally according to the circumstances of the offender. When people show that they can not be trusted to keep faith, the proper remedy is to avoid entering into agreements with them. If we can only succeed in raising the general moral standard of international diplomacy I think we shall find that in course of time nations will find that it is to their interest to acquire a reputation for keeping faith. But that is really a part of the larger problem of how to make men honest.

If ever it proves possible to make the jurisdiction of the Court obligatory upon all civilized nations, we may be sure that by that time the international organization of the world will have become a much more intricate and complicated thing than it is now. We already have the beginnings of international organization in such things as the Postal Union and the various offices which are getting to work under the authority of the League of Nations. As this organization develops, it will become increasingly necessary for every nation to retain its place on a secure footing in the organized society of the civilized world.

When that time comes, I do not think that we shall find it necessary to worry very much over the problem of enforcing compliance with the decrees of an international court. What we have to do is to make the League of Nations, or whatever we may choose to call it, so valuable and indeed so essential to the full development of every nation that a nation will prefer to make any sacrifice that an adverse decision may curtail rather than risk any forfeiture of the benefits which it derives from participation in the organized society of the world. I am not myself a believer in any schemes which involve the employment of international armed force for the coercion of recalcitrant states. All such schemes necessarily involve the principle of committing nations in advance to take part in wars which their own judgment may not approve. War is such a frightful thing that we really can not expect nations to pledge themselves unreservedly to make war in cases where their own vital interests are not involved. The real punishment for those who will not recognize international obligations is to cut them off from the benefits of international society. But before that remedy can become really effective we must make the practical benefits of the international society so valuable that no nation, however powerful, can afford to part with them. When that time comes, and I believe

that some day it will come, I do not think that we shall find it necessary to occupy ourselves with elaborate schemes for enforcing compliance with the decrees of the international court. The present weakness of the League of Nations consists, not in its lack of armed force, but in the fact that its benefits are not sufficiently obvious to make all nations clamor for membership.

"The Place of the United States in a World Organization for the Maintenance of Peace." That is a question which must be decided by the people of the United States acting according to their own judgment of what is best in the interests of their own country. In the discussion of that question I would not venture to intervene, and I will only say, what everyone knows to be true, that no international organization of the world can be regarded as really permanent or effective which does not include the whole-hearted coöperation of the United States.

CANADA'S PART

In September, 1919, the Canadian Parliament, summoned in special session, ratified the signature of the Canadian plenipotentiaries to the Treaty of Versailles and the Covenant of the League of Nations. Shortly afterwards, when the Parliaments of the United Kingdom and the other Dominions had taken similar action, the King, "acting for Canada," as our statute expresses it, affixed his own signature of ratification.

In thus deciding to enter the new world organization our statesmen and people did not commit themselves to any assertion that the Treaty and the Covenant were perfect in every possible respect. We sent our delegates to the first Assembly of the League at Geneva, and I hope that I am not unduly boastful in saying that they made a valuable contribution to the debates. The present position of the great Dominions in the British Empire is so often misunderstood that I think many observers were somewhat surprised at the vigorous and independent part played by the Canadian delegates. I refer to their action in the present discussion only because I believe that the policy supported by Canada is in entire harmony with the traditional ideals of the United States.

The principle for which our delegates contended at Geneva was that principle, which underlies the American Constitution, of the equal international rights of all states. I do not, of course, mean that all states are to have the same voting power or to carry the same weight in the deliberations of the League. Such an idea would be quite intolerable to the great powers and could never be seriously suggested. What I do mean is that we have to guard against the danger of the League being manipulated into a modern example of the Holy Alliance or its successor, the so-called "Concert of Europe." There is one article in the Covenant—which is, of course, Article 10—which carries with it a very distinct flavor of the Congress of Vienna. Therefore, the Canadian delegates made a strong effort to obtain the deletion or revision of this article. In this effort, which was not immediately successful, I know that our policy will command a large measure of sympathy in the United States.

Then again, our delegates took a prominent part in the successful opposition to certain proposals which would have tended to concentrate authority over certain matters at the executive center of the League in the hands of the great powers of Europe: and although the United States in itself is one of the great powers of the world, I venture to think that in this matter also we could hope for its support. Finally, our dele-

gates took an active part in the deliberations which resulted in the statute establishing the international court. Just as the Supreme Court of the United States has been the bulwark of the equal rights of all states in the American Union, so we must look to the international tribunal to uphold the equal rights of all states, both great and small, in the Society of Nations. With the principles upon which that Court has been constructed I believe that the people of Canada are in hearty accord.

It may be many years before we see the consummation of the work to which we have set our hands, but we believe that the time will come. If I may borrow a phrase which has been consecrated to the United States from the early days of its history, we look forward to a day when the government of the world shall be "a government of laws and not of men."

Compulsory Arbitration Not Essential to An Effective World Organization

By GEORGE W. WICKERSHAM
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THE weak have but one weapon—the administration of justice; the strong have the weapon of force. As the great war proceeded, in the exercise by the great Power which thought its weapon of force was invincible, there came over the consciousness of the world a resolution which, at one time, at least, was profound—that the rule of justice must be extended over the strong as well as the weak. As time went on, and that awful struggle with its chapter of atrocities and horrors swept into its pathway more and more peoples and increasingly destroyed the accumulations of civilization, I take it that resolve deepened. Then the war came to an abrupt end.

Ferdinand Foch some time ago said, justifying the Armistice: "What more can a military commander do than to say to the statesmen, 'Make what peace you will, I will enforce it.'" The task of applying to the world in peace this ideal, this conception of extending the reign of justice over the strong and the weak alike, was devolved upon the statesmen of the world. Have they done their work as well as the soldiers did theirs? It is two years and a half since the Armistice was signed; and the world is still debating how this rule of justice can be attained, and are told, in effect, that this is an illusory dream; that nations will be bound only within the limits of their strength by what they must yield to, and that what little progress we may make must be step by step towards that far-off, unattainable ideal.

Yet to me there is a better ideal. Statesmen had a better conception. I think the League of Nations, which, unfortunately, was made a football of domestic politics, embodied a much better conception, a much more practical conception of the attainment of justice between the nations than that. What did it provide? There were two things—a place where the representatives of the nations of the earth could assemble around a table with the right to discuss questions of an international character; and an agreement by all the parties not to make war against each other until they had either submitted the controversy, which brought them